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No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

SCRAPP INVESTMENT COMPANY, INC.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

STUART J. SNYDER,
231 St. Paul Place,
Baltimore, Maryland 21201,
(301) 539-4375,
Attorney for Petitioner.

The Daily Record Co., Baltimore, MD 21202

QUESTIONS PRESENTED

1. Did the Court of Appeals err by ratifying the district court's finding of probable cause where the lower court's finding rests exclusively upon hearsay statements unsupported by oath or affirmation?

2. Did the Court of Appeals err by holding that facts establishing probable cause necessary to justify seizure of property pursuant to 21 U.S.C. § 881(b)(4) need not be extant at the moment of the seizure?

3. In the context of a contested, warrantless police seizure of property; does proof of probable cause constitute an issue of fact which the district court must receive evidence on, and resolve within, the forum of a hearing pursuant to F. R. Crim. P. § 41(e)?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The petitioner, Scrapp Investment Company, Inc.[1] respectfully prays a writ of Certiorari issue to review the

[1] Petitioner is a corporation established and domiciled in the Sovereign State of Maryland.

judgment of the United States Court of Appeals for the Fourth Circuit entered on May 1st, 1987.[2]

OPINIONS BELOW

On May 1st, 1987, the United States Court of Appeals for the Fourth Circuit affirmed the United States District Court for the District of Maryland's Order dismissing the Petitioner's Complaint for return of its property, filed pursuant to Federal Rules of Criminal Procedure § 41(e). This *unpublished* opinion is found in the Appendix A-1. A timely Petition for Rehearing and Suggestion for Rehearing *en banc* was denied by the Court of Appeals on June 30th, 1987. A copy of this Order of denial appears in the Appendix at A-8.

JURISDICTION

On May 1st, 1987, The United States Court of Appeals for the Fourth Circuit denied the petitioner's appeal from the Order of the United States District Court of Maryland denying petitioner's complaint for return of its property, and motion for reconsideration of the denial of the compiaint. *Appendix at A-1.* The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1), *See also,* Supreme Court Rule 17.1(a), (c).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution *provides*:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable

[2] The Court of Appeals for the Fourth Circuit decided this case on May 1st, 1987. A timely Petition for Rehearing and Suggestion for Rehearing en banc was denied by the Fourth Circuit on June 30th, 1987. *See* Appendix at A-8. The time for filing this petition for writ of Certiorari, pursuant to Supreme Court Rule 20.2 and 28 U.S.C. § 2101(c), is within 90 days after the entry of the judgment.

searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

STATUTORY PROVISIONS INVOLVED

Title 21 U.S.C. § 881(b)(4) provides:

"Any property subject to forfeiture to the United States under this subchapter may be siezed by the Attorney General upon process issued pursuant to the Supplemental Rules for Certain Admiralty and Maritime Claims by any district court of the United States having jurisdiction over the property, except that seizure without such process may be made when—

> (4) the Attorney General has probable cause to believe that the property has been used or is intended to be used in violation of this subchapter.

In the event of seizure pursuant to paragraph (3) or (4) of this sub-section, proceedings under subsection (d) of this section shall be instituted promptly."

RULES OF PROCEDURE INVOLVED

Federal Rule of Criminal Procedure § 41(e) provides:

"A person aggrieved by an unlawful search and seizure may move the district in which the property was seized for the return of the property on the ground that he is entitled to lawful possession of the property which was illegally seized. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored and shall not be admissible in evidence at any hearing or trial. If a motion for return of property is made or comes on for hearing in the district of trial after an indictment or information is filed, it shall be treated also as a motion to suppress under Rule 12."

STATEMENT OF THE CASE

This case originated in the United States District Court for the District of Maryland wherein the petitioner, Scrapp Investment Company, Inc., filed a Motion for the Return of Seized Property, to wit, a 1982 Maserati Quatroporte, pursuant to Rule 41(e) of the Federal Rules of Criminal Procedure. The district court directed the United States Government to show cause why the relief sought should not be granted. Both parties submitted Memoranda of Law. Further, in response to a letter of inquiry from the district court, the government submitted an unsworn investigatory report in support of its arguments that probable cause existed so as to justify seizure and forfeiture of the petitioner's property. Without affording the petitioner the benefit of a hearing or entertaining oral argument, the district court denied petitioner's Rule 41(e) Motion.

Subsequently, the district court also denied a timely filed motion for reconsideration and a timely appeal was taken to the United States Court of Appeals for the Fourth Circuit. The Court of Appeals affirmed the judgment of the district court in an unpublished opinion dated May 1st, 1987 (App. A-1). A timely petition for rehearing and suggestion for rehearing *en banc* was denied June 30th, 1987 (App. A-8).

STATEMENT OF FACTS

On December 5th, 1984, Special Agents of the Drug Enforcement Administration (DEA), agents of the Internal Revenue Service, and members of the Baltimore City Police Department searched the premises of Melvin Williams at 2206 Park Avenue, Baltimore, Maryland, and seized among other things, the petitioner's 1982 Maserati Quatroporte. The Search and Seizure Warrant, issued on November 29th, 1984 by a United States Magistrate in the

United States District Court for the District of Maryland, listed ten (10) categories of specific property to be seized at 2206 Park Avenue, including written documents, books, records, United States currency, jewelry and precious metals. The petitoner's Maserati was not listed among the items of property to be seized, and cannot be included in or inferred into any of the ten (10) categories of property listed in the warrant. Further, the Return Affidavit made no mention of the vehicle among the various items recovered from the premises.

At the time of the seizure, the subject vehicle was owned by, titled to, and registered in the name of Scrapp Investment Company, Inc. ("Scrapp, Inc." or "Petitioner", hereafter), of 2114 Edmondson Avenue, Baltimore, Maryland 21217. Mary Williams, wife of Melvin Williams, was then and is now an officer of Scrapp, Inc., and was using the vehicle on behalf of Scrapp, Inc. at the time of its seizure.[3]

Subsequent to the seizure, the DEA instituted forfeiture proceedings against the vehicle which was declared formally forfeited on June 17th, 1985.[4] Notice of the forfeiture proceedings was mailed to Melvin Williams who at the time was incarcerated in the District of Columbia. Petitioner, the owner of the vehicle, never received any such notice, despite the assertions of the government to the contrary. During the pendency of the Rule 41(e)

[3] As iterated above, Melvin Williams is the husband of Mary Williams. Melvin Williams was not an officer, director, or owner of Scrapp, Inc. at the time of the seizure, and maintained no open or concealed ownership in this corporation. Conversely, Mary Williams was an officer, owner, and director of Scrapp, Inc., and had parked the Maserati at her home, that she shared with her husband at the time of the seizure. Mary Williams was in the premises of her home when this seizure occurred.

[4] Forfeiture of the vehicle occurred pursuant to 21 U.S.C. § 881(d) through administrative channels. Forfeiture was not judicially ordered.

proceedings in the district court, the government contended that a grand jury investigation was in *esse* against the petitioner. Nonetheless, the petitioner pointed out to the Court of Appeals that assuming arguendo that a grand jury criminal prosecution was in *esse* against Scrapp, Inc. at the time of the Rule 41(e) proceedings (a proposition the petitioner vigorously disputed below), the grand jury in question had disbanded, and no indictment had been returned against Scrapp, Inc., or Melvin Williams, during the pendency of appeal.

In response to the filing of the Rule 41(e) motion, the district court directed the government to show cause why the vehicle should not be returned to Scrapp, Inc. On February 3rd, 1986, the government filed an unsworn response to the show cause Order. On April 18th, 1986, the district court wrote counsel for the government and stated *inter alia:*

> "I reviewed the government's response to the Show Cause Order issued by this Court on January 13th, 1986, in the subject case, and the responses filed by the petitioner. I am also in receipt of your March 24th letter regarding the decision of the Department of Justice forfeiture counsel, and have considered it and its enclosures as well. If you have not done so already, please ensure that Mr. Snyder [Counsel for the petitioner] is sent a copy of those materials, as he is not shown as having received a copy.
>
> Before I decide the issues pending in this case, I need some clarification. On pages four and five of the government's response you state that the legality of the searches at issue has been established in the proceedings against Melvin Williams in the Eastern District of Virginia. You have supplied no evidence of this fact *and, if the seizure of the Maserati was based on probable cause, you have not indicated what probable cause the Drug Enforcement agents had at the time the vehicle was seized."* (Emphasis supplied by petitioner).

Despite the enunciation by the district court of the need for the government to demonstrate that probable cause existed at the moment of the warrantless seizure of Scrapp, Inc.'s Maserati, the court relied upon the March 24th, 1986 letter from counsel for the government and enclosed results of the Department of Justice investigation of Melvin Williams' Petition for Remission of the forfeiture of the Maserati,[5] as well as a May 21st, 1986 letter to prove probable cause (App. A-4, 5). The Court of Appeals also concluded:

> "The instant case clearly involves a forfeiture of property and is not a search and seizure case. Scrapp's action is nothing more than an attempt to circumvent the finality of a forfeiture decision by belatedly interjecting arguments regarding the illegality of the initial seizure through Rule 41(e). This we cannot sanction." (App. A-6).

In a timely filed Petition for Rehearing and Suggestion for Rehearing *en banc*, Scrapp, Inc. indicated that the Court of Appeals had overlooked or misapprehended the following points of fact and law:

— The government's failure to produce evidence of probable cause for the seizure and forfeiture;

— The lack of evidence that the Maserati was ever used in violation of Title 21, § 881;

— The government's reliance on unsworn hearsay allegations to prove probable cause;

— The failure of the (district) court . . . to receive any evidence regarding probable cause in deciding the Rule 41(e) motion;

---

[5] The DEA Report of Investigation of the 1982 Maserati Quatroporte was prepared on June 27th, 1985, some six and one-half (6½) months *after* the vehicle was seized, and set forth information that was acquired long after the seizure had transpired, and which was not within the knowledge of the seizing officials.

— At the time the court handed down this decision the prosecution *in esse* of Melvin Williams had terminated;

— And that the court's decision conflicts in a diametric way with the Fourth Amendment . . ."

See, Petition for Rehearing and Suggestion for Rehearing en banc at A-2.

The Court of Appeals rejected these arguments through denial of the Petition for Rehearing. This Petition for Certiorari now follows.

REASONS FOR GRANTING WRIT OF CERTIORARI

This petition presents the Court with the opportunity to clarify whether proof of probable cause must entail support of oath or affirmation *vel non*. In this case the district court and the Court of Appeals held that probable cause was established for the warrantless seizure of the petitioner's Maserati *solely* on the basis of unsworn government reports that were not supported by any oath or affirmation. The facts in the case at bar will demonstrate that the petitioner, a small business corporation, has been divested of ownership in its property as a result of a warrantless police seizure, and subsequent forfeiture, on facts that no person has supported by oath or affirmation.

Secondly, this petition raises the important question of whether the Court of Appeals is correct in holding that 21 U.S.C. § 881(b)(4) (which authorizes warrantless seizures of property "when" the attorney general has probable cause to believe the property has been or is intended to be used in violation of the narcotics laws), does not require that the facts upon which probable cause is premised be extant at the time of the seizure within the knowledge of

the seizing officials. Stated alternatively, the holding of the Court of Appeals in this case stands for the proposition that probable cause need not be based on facts within the knowledge of the police at the time of the initial seizure; but that these facts can be developed later to support a seizure which was unlawful — unsupported by facts establishing probable cause within the knowledge of the police — at its inception. This holding represents an anomaly in the law, and is in direct tension not only with the teachings of this Court, but cases of the Fourth Circuit as well. Moreover, several courts have come to conflicting conclusions on this important issue, and final resolution of the question by this Court is warranted to settle the law in this area.

Third and lastly, this petition presents the important question of whether the dispute of probable cause represents an issue of fact that necessitates a hearing pursuant to F. R. Crim. P. 41(e) in the context of a warrantless seizure of property where the government has the initial burden of proving probable cause. Here, the Court of Appeals found an evidentiary hearing was not required based on its view that the unsworn hearsay statements constituted sufficient proof to sustain a finding of probable cause — and the subsequent failure of petitioner to rebut this "proof" eliminated the need for an evidentiary hearing. Clearly, if the Court can determine that disputes concerning the existence of probable cause in the context of a warrantless police seizure of property, represent an "issue of fact necessary to the decision of the motion" (Rule 41[e]), then the Court of Appeals' decision clearly runs afoul of the mandatory requirement for evidentiary proceedings laid down by the United States Congress.

Moreover, the decision of the Court of Appeals below imports into the Rule 41(e) theater a novel concept that, in the case of a warrantless seizure of property where

probable cause is contested, a hearing can be denied because the party which does not have the initial burden of persuasion on the issue of probable cause, fails to establish facts which demonstrate the non-existence of same.

In a word, the decision of the Court of Appeals in this case represents nothing short of a drastic departure from the settled jurisprudence of this Court, and is radically at odds with the directives of the Constitution and the Congress. The confusion spawned by the varied answers the lower courts have given to some of the questions raised in its petition is an additional factor which supports Certiorari review in this case.

I.

THE COURT OF APPEALS ERRED BY RATIFYING THE DISTRICT COURT'S FINDING OF PROBABLE CAUSE WHERE, AS HERE, THE LOWER COURT'S FINDING RESTS EXCLUSIVELY UPON UNSWORN HEARSAY STATEMENTS, UNSUPPORTED EITHER BY OATH OR AFFIRMATION.

The Fourth Amendment to the United States Constitution provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, *and no warrant shall issue, but upon probable cause, supported by Oath or affirmation,* and particularly describing the place to be searched, and the persons or things to be seized." (emphasis added).

It is certain from the text of the Fourth Amendment, emphasized above by the petitioner, that the intention of the framers was to require a showing of probable cause be supported by "Oath or affirmation". Indeed, this Court has held that a Magistrate may find probable cause only "from facts or circumstances presented to him under oath or

affirmation", *Nathanson v. United States,* 290 U.S. 41, 47, 54 S. Ct. 11, 13, 78 L. Ed. 2d 159 (1933). *See, Frazier v. Roberts,* 441 F.2d 1224, 1227 (8th Cir. 1971) (collecting cases):

> "The nearly unanimous view is that the Fourth Amendment requires that only information related to the Magistrate on Oath or affirmation is competent upon which to base a finding of probable cause; that unsworn oral statements may not form a basis for that decision."

The requirement that probable cause be supported by oath or affirmation has been reiterated in a series of this Court's cases. *See, Albreacht v. United States,* 237 U.S. 1, 47 S. Ct. 250, 71 L. Ed. 2d 505 (1927) (An arrest warrant issued upon affidavits that were not properly verified is unlawful); *Giordenello v. United States,* 357 U.S 480, 485-486, 78 S. Ct. 1245, 2 L. Ed. 2d 1503 (1958) (The language of the Fourth Amendment, that . . . no warrants shall issue but upon probable cause, supported by Oath or affirmation . . . of course applies to arrest as well as search warrants). Cf. *Gerstein v. Pugh,* 420 U.S. 103, 117, 95 S. Ct. 854, 43 L. Ed. 2d 54 (1974) [T]he Court held that an arrest warrant issued solely upon a United States' attorney's information was invalid because the accompanying affidavits were defective.).

It is undisputed in this case that the report relied upon by the district court and the Court of Appeals to find that the respondent United States had probable cause to seize and forfeit the petitioner's Maserati was not supported by oath or affirmation in any respect. The Court of Appeals dismissed this fact as insignificant, even though the deficiency was explicitly called to its attention. *See Petition for Rehearing and Suggestion for Rehearing en banc* at A-2, 4-5.

In *United States v. Turner,* 558 F.2d 4, 50 (2d Cir. 1977), the Court explained the reasons an oath or affirmation is

fundamentally important in the scheme of determining probable cause for searches and seizures:

> "An 'Oath of affirmation' is a formal assertion of, or attestation to, the truth of what has been, or what is to be said. It is designed to ensure that the truth will be told by insuring that the witness or affiant will be impressed with the solemnity and importance of his words. The theory is that those who have been impressed with the moral, religious or legal significance of formally undertaking to tell the truth are more likely to do so than those who have not made such an undertaking or have been so impressed."

The practical implications of the decision of the Fourth Circuit in sustaining the finding of probable cause based upon unsworn hearsay statements — supported nowhere by oath or affirmation of the proponent of those statements — is to authorize searches and seizures in diametric conflict with the express requirements of the Fourth Amendment.

Moreover, the departure from the requirement that probable cause be supported by "Oath or affirmation" cannot be justified upon a theory that the petitioner's property was confiscated pursuant to a statute which permits seizures of property without a warrant.[6] In *Whiteley v. Warden of Wyoming Penitentiary*, 401 U.S. 560, 566, 91 S. Ct. 1031, 28 L. Ed. 2d 306 (1971), the Court explicitly reaffirmed that "*the standards applicable to the factual basis supporting the officer's probable cause assessment at the time of the challenged arrest and search are at least as stringent as the standards applied with*

[6] 21 U.S.C. § 881(b)(4) permits warrantless searches of property when "the Attorney General has probable cause to believe that the property has been used or is intended to be used in violation of this subchapter."

respect to the magistrate's assessment.[7] Accordingly, whether the probable cause determination involves a seizure effectuated pursuant to a warrant — or without one — becomes a distinction without a difference with respect to the infirmity of proof of probable cause, unsupported by oath or affirmation.

Moreover, the lower court's finding of probable cause based on information unsupported by oath or affirmation, cannot be validated by the notion that, because the seizure in the instant case involves a forfeiture statute, the Fourth Amendment standards governing probable cause determinations are inapplicable. This is true because this Court has squarely held the standard of probable cause mandated by the Fourth Amendment is the same standard as applied within the context of forfeiture. *One Plymouth Sedan v. Pennsylvania,* 380 U.S. 693, 697-698, 703 n.12 (1965). *See also, Application of Kingsley,* 614 F. Supp. 219, 224 (D.C. Mass. 1985). This observation is buttressed further by the holdings of the lower courts that the government has the burden of proving probable cause in context of forfeiture proceedings. *United States v. $64,000 in U.S. Currency,* 722 F.2d 239 (5th Cir 1986); *United States v. One 1979 Porche Coupe,* 709 F. 2d 1424 (11th Cir 1983); *United States v. One 1976 Porche,* 670 F.2d 810 (9th Cir. 1979).

Moreover, it has long been settled that the protections of the Fourth Amendment extend to corporations such as the petitioner in the case at bar, *Silverthorne Lumber Co. v. United States,* 251 U.S. 385, 40 S. Ct. 182, 64 L. Ed. 319 (1920); *G.M. Leasing Corp v. United States,* 429 U.S. 338, 97 S. Ct. 619, 50 L. Ed. 2d 530 (1977). Equally settled is

[7] In *Whiteley, supra,* at *401 U.S. 566,* the Court explicitly rejected the argument of the State of Wyoming that a reviewing court should employ a less stringent standard for reviewing a police officer's assessment of probable cause a prelude to a warrantless seizure than the court would employ in reviewing a magistrate's assessment as a prelude to issuing a warrant.

the fact that probable cause has the same meaning in the Federal Rule of Criminal Procedure 41 context, as it does within the text of the Fourth Amendment: (viz) ("*Both the Constitution and Rule 41[c] require a determination that probable cause exists before a warrant may issue*", Wright, Federal Practice and Procedure, 2d Ed, Rule 41, § 662). Accordingly, whether probable cause must be ascertained within the context of forfeiture, F. R. Crim. P. 41, or standard Fourth Amendment search and seizure proceedings — the proof necessary to sustain a finding of probable cause *must*, of Constitutional necessity, be supported by oath or affirmation. The decision of the Court of Appeals, which carves out an unexplained exception to the requirement that competent proof of probable cause be supported by oath or affirmation, merits the review of this Court *via* certiorari. Prudential considerations as well as jurisprudential considerations warrant review in this case because the decision of the Court of Appeals in this case authorizes the seizure and forfeiture of the petitioner's property absent traditional and valid proof of probable cause.

Effectively, on the basis of papers tendered by parties who are not exposed to any pains and penalties of perjury for statements that petitioner may well prove are reckless and false, the Court of Appeals has justified the divestment of petitioner's possessory and property interests in its vehicle seized by the government. This Court should clarify for the guidance of the lower courts, whether proof of probable cause must encompass support of oath or affirmation as a fundamental requirement of the Fourth Amendment.

II.

THE COURT OF APPEALS ERRED BY HOLDING THAT FACTS ESTABLISHING PROBABLE CAUSE NECESSARY TO JUSTIFY SEIZURE OF PROPERTY PURSUANT TO 21 U.S.C. § 881(b)(4) NEED NOT BE EXTANT WITHIN THE KNOWLEDGE OF THE SEIZING OFFICIALS AT THE MOMENT OF THE SEIZURE.

Below, petitioner argued before the district court and the Court of Appeals, that probable cause findings, in addition to being supported by oath or affirmation, must depend on facts extant within the knowledge of the seizing officials at the moment of the seizure. The Court of Appeals rejected this argument by stating: "*The mere fact that the report was not prepared until six months after the car was initially seized does not mean that probable cause was lacking on the date of the seizure in December 1984*". (App. A-6). This conclusion of the Court of Appeals is incorrect for both legal and factuai reasons. With respect to the facts, the Court of Appeals is incorrect because the report relied upon by the District Court and the Court of Appeals to find probable cause *was not* prepared on the basis of information within the knowledge of *any* of the seizing officials; moreover, the report *was not even prepared by* any of the seizing officials.

The district court and the Court of Appeals both had before them the search and seizure warrant and affidavits as regards the premises of Melvin Williams. The lower courts both were well aware that the seizing officers of the petitioner's Maserati, were the same officials who executed the search and seizure warrant pertaining to Melvin Williams — and the same officials who seized the Maserati during the December 5th, 1984 execution of the search and seizure warrant relevant to Melvin Williams. Equally true, both lower courts knew from the face of the DEA report (prepared six months after the seizure of the Maserati) that the authors of this report had no involvement in the seizure of the Maserati.

With respect to the legal flaw in the Court of Appeals' conclusion, rejecting the petitioner's argument that probable cause must depend on facts extant at the moment of the seizure; the decision of the Court of Appeals conflicts dramatically with a long, uninterrupted, and impressive body of decisions of this Court.

> "Whether [an] arrest was constitutionally valid depends in turn upon whether, at the moment the arrest was made, the officers had probable cause to make it; *whether at that moment* the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the petitioner had committed or was committing an offense." *Beck v. Ohio*, 379 U.S. 89, 91, 85 S. Ct. 223, 13 L. Ed. 2d 142 (1964). (Emphasis added by petitioner).

The rule announced in *Beck* has repeatedly been reaffirmed by this Court with respect to the requirement that probable cause be grounded in facts and circumstances extant within the ambit of the knowledge of the authorities making an intrusion upon Fourth Amendment protected interests. *See, Terry v. Ohio,* 392 U.S. 1, 21-22, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968); *United States v. Jacobsen,* 466 U.S. 109, 115 (1984) ("The reasonableness of an official invasion of the citizen's privacy, must be prepared on the basis of the facts as they existed at the time that invasion occurred"); *United States v. Hensley,* 469 U.S. 221, 232-233 (1985), (citing *Terry v. Ohio, supra*); *See also, Aquillar v. Texas,* 378 U.S. 108 n.1 (1964). Explaining the underpinnings for this requirement of facts being extant within the knowledge of police undertaking a Fourth Amendment intrusion, this Court stated in *Terry v. Ohio, supra*:

> "[I]n justifying the particular intrusion, police officer's must be able to point to specific facts which, taken together with rational inferences from those

> facts, reasonably warrant that intrusion. The scheme of the Fourth Amendment becomes meaningful only when it is assured that at some point the conduct of those charged with enforcing the laws can be subjected to the more detached, neutral scrutiny of a judge who must evaluate the reasonableness of a particular search or seizure in the light of the particular circumstances. *And in making that assessment it is imperative that the facts be judged against an objective standard: would the facts available to the officer at the moment of the seizure or search warrant a man of reasonable caution in the belief that the action taken was appropriate. Anything less would invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches, a result this Court has consistently refused to sanction.*" (Emphasis added by petitioner).

Id. at 392 U.S. 21-22. (Citations omitted).

The Court of Appeals cited no authority for the proposition that the finding of probable cause may properly be divorced from proof of facts which were extant at the time of the intrusion upon rights protected by the Fourth Amendment. The weight of authority establishes that a finding of probable cause must be grounded in facts known to the police at the time they undertake an intrusion upon Fourth Amendment protected rights. Moreover, a plain reading of 21 U.S.C. § 881(b)(4) makes clear that probable cause for seizure pursuant to this statute must be extant at the time the seizure occurs. Hence, it makes little sense, and is dead wrong as a matter of law, to hold that a seizure pursuant to this statute can be justified by information other than that extant within the knowledge of the seizing officials at the time the seizure transpires. If the rule was otherwise, federal authorities could take private property without probable cause, and develop reasons justifying the intrusion after the transgression has occurred, with "facts"

which were not within their knowledge at the time of the seizure.

But the rule is not otherwise, and the teachings of this court instruct that probable cause must be premised upon the information known to the police at the time the intrusion occurs, and not afterwards, as it was in the case at bar. This case presents the Court with an opportunity to clarify this important concern. The need for clarity is strengthened when this Court considers that the controlling law in the Fourth Circuit in point, requires that the facts supporting probable cause in the context of a warrantless seizure pursuant to 21 U.S.C. § 881(b)(4), be extant in the knowledge of the police contemporaneously with the seizure. *Cf. United States v. Kemp,* 690 F.2d 397 (4th Cir. 1982), at 401: ("To be justifiable under 21 U.S.C. § 881(b)(4), the Attorney General must have had probable cause to believe *at the time of the seizure that the vehicle had been used in violation of the drug laws,* and it must also be reasonable under the Fourth Amendment.").

Surely the fact that a decision contrary to law of the Circuit, that happens to be unpublished (as in the case at bar), cannot eviscerate the petitioner's rights to Fourth Amendment protections. Finally, even if an attempt was made to justify the warrantless seizure on the grounds of the vehicle appearing to be contraband in plain view of the seizing officials, the most recent expression of the Court in this area leaves no doubt that probable cause must support a seizure of property under the plain view doctrine. Cf. *Arizona v. Hicks* ___ U.S. ___ (Slip Opinion No. 85-1027, March 3rd, 1987, Slip at 5). If the facts are not extant within the knowledge of the seizing authorities at the time of the seizure, then probable cause simply cannot be found to have been present at that time. It has long been a well-settled truism in the law that ". . . nothing that happened thereafter could make that [seizure] lawful", *Rios v. United States,* 364 U.S. 253-262

(1960). Therefore, the Court of Appeals could not properly rely upon a report prepared 6 months after the seizure of the petitioner's Maserati to find probable cause when none of these facts were shown to be in the knowledge of the seizing officials at the time of the seizure. The Fourth Amendment, 21 U.S.C. § 881(b)(4), and Rule 41(e) are all offended by requiring anything less than recognition of this truth. Hence, certiorari should be granted to dispel any lingering doubts about the vitality of this doctrine in the law.

III.

IN THE CONTEXT OF CONTESTED, WARRANTLESS POLICE SEIZURES OF PRIVATE PROPERTY; PROOF OF PROBABLE CAUSE CONSTITUTES AN ISSUE OF FACT THAT THE DISTRICT COURT MUST RECEIVE EVIDENCE ON, AND RESOLVE, IN THE FORUM OF A HEARING PURSUANT TO FEDERAL RULE OF CRIMINAL PROCEDURE 41(e)

Federal Rule of Criminal Procedure 41(e) provides, in pertinent part, that:

> "A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property on the ground that he is entitled to lawful possession of the property which was illegally seized. *The judge shall receive evidence on any issue of fact necessary to the decision of the motion . . .*" (emphasis added by petitioner).

Petitioner, of course, filed such a motion in the United States District Court for the District of Maryland, the district from which its vehicle was seized. With respect to property seized by the government with the intent to forfeit same, this Court has explicitly stated:

> "If the claimant believes the initial seizure was improper, he could file a motion under Federal Rule of Criminal Procedure 41(e) for a return of the seized property." *United States v. $8,850.00,* 461 U.S. 555, 569 (1983).

Rule 41(e) makes it mandatory for a district court to "receive evidence on any issue of fact necessary to the decision of the motion." In this case, the lower court failed to receive any evidence pertaining to the fact of whether the seizing police had sufficient facts within their knowledge, at the time of the seizure to support a finding of probable cause. As the petitioner argued *infra,* in section I of this petition, the unsworn report relied upon by the Court of Appeals to ratify the district court's finding of probable cause, is insufficient simply because facts unsupported by oath or affirmation cannot lawfully be considered "evidence" of probable cause.

It is beyond serious argument that whether police have probable cause *vel non* to support a warrantless seizure of property, is an issue of fact necessary to the decision of a Rule 41(e) motion.

This Court has stated that: "Federal Rule of Criminal Procedure 41(e) . . . reflects the Fourth Amendment's policy against unreasonable searches and seizures," *Zurcher v. Standford Daily,* 436 U.S. 547, 558 (1978). As such, in the context of a warrantless seizure of property, whether in the forfeiture or in a general search and seizure context of the law, the burden is upon the government to introduce evidence which establishes probable cause for the Fourth Amendment intrusion.[8] Rule 41(e) required evidence to be submitted by the government to sustain its burden of proving probable cause in response to the petitioner's motion. The petitioner has argued, *infra,* at section II of the petition, that the district court received no evidence of what probable cause the federal agents and police had at the time the vehicle was seized.

[8] e.g. *Mincey v. Arizona,* 437 U.S. 385, 390-91 (1978); *U.S. v. Jeffers,* 342 U.S. 48, 51 (1951); *Chimel v. California,* 395 U.S. 752, 762 (1969) (Warrantless searches); *U.S. v. $38,600.00,* 722 F.2d 239 (5th Cir. 1983); *U.S. v. One 1980 Stapleton Pleasure Vehicle, etc.,* 575 F. Supp. 473 (D.C. Fla. 1983) (Forfeiture).

The report, prepared by the DEA six months after the seizure — which, in addition to being unsworn, did not indicate facts which were extant in the knowledge of the seizing officials — simply cannot represent "evidence" to establish probable cause. Under the circumstances presented in this case, Rule 41(e) should have been read to convene a hearing in which the petitioner would have an opportunity to controvert the government's proof. Unquestionably, Rule 41(e) requires a judge to receive evidence on issues of fact necessary to the decision of the motion, and in this case, it is clear that the written submissions of the government simply do not constitute "evidence". And the court received nothing else besides insubstantial written submissions to decide the petitioner's motion in this case. The consequence of this procedure manifest in a deprivation of property without an opportunity to be heard, or to even have the court decide a motion on the basis contemplated by the enabling rule. As it now stands, the petitioner's motion for the return of its property has been adversely decided when there is no recorded evidence whatsoever to support this result.

This Court could clarify the circumstances under which a hearing should be held or, at a minimum, the procedures which should attend receipt of evidence in the context of warrantless seizures of property sought to be returned pursuant to Rule 41(e) by granting certiorari review in this case. The need for review becomes enhanced significantly when the Court considers law enforcement personnel are increasingly resorting to warrantless seizures and forfeitures of property pursuant to 21 U.S.C § 881(b)(4), and that if, as here, the government does not have to introduce probable cause in the context of a Rule 41(e) proceeding, rule 41(e) will have been reduced to a mere form of words. Accordingly, this extraordinary and radical departure from decision making by the lower courts warrants the intervention and direction of this Honorable Court.

CONCLUSION

This case presents a disturbing example of just how far some courts have strayed from traditional Fourth Amendment doctrine, and concommitantly, how these same courts have demonstrated a willingness to sanction permanent deprivation of property on a basis repugnant to the Constitution. While the Court has indicated: "We are unwilling to send police and judges into a new thicket of Fourth Amendment law to seek a creature of uncertain description . . .", *Arizona v. Hicks, supra,* Slip opinion 7, certiorari review in this case, in the converse, can only function to bring courts out of the thicket of "confusion", a thicket which this case shows that probable cause can be proven and found without the support of an "Oath or affirmation"; facts *dehors* the knowledge of police at the time they effectuate a seizure, can be developed six months after the seizure (by persons who had nothing to do with same), and be held to support the seizure; and a motion for return of property can be decided adversely against the moving party, even though, the government has the burden of proving probable cause, and the court has received no evidence.

If the petitioner is correct in its belief that law is something more than the naked exercise of power, then this Honorable Court must exercise its venerable discretion to grant certiorari in order to answer the simple yet important questions presented in this petition.

It is so prayed.

Respectfully submitted,

STUART J. SNYDER,
231 St. Paul Place,
Baltimore, Maryland 21201,
(301) 539-4375,
Attorney for Petitioner.

APPENDIX

TO PETITION FOR WRIT OF CERTIORARI

[Unpublished]

United States Court of Appeals
for the Fourth Circuit

No. 86-1670

Scrapp Investment Co., Inc., Plaintiff-Appellant,

v.

United States of America, Defendant-Appellee.

Appeal from the United States District Court for the District of Maryland, at Baltimore
(Joseph H. Young, District Judge)
(CA-85-506-Y)

Argued: February 5, 1987 *Decided: May 1, 1987*

Before WIDENER *and* HALL, *Circuit Judges, and* SPENCER, *United States District Judge for the Eastern District of Virginia, sitting by designation*

Stuart Jay Snyder for Appellant; Larry David Adams, Assistant United States Attorney (Breckinridge L. Willcox, United States Attorney on brief) for Appellee

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Per Curiam:

Scrapp Investment Company, Inc. ("Scrapp") appeals an order of the district court dismissing its complaint,

brought pursuant to Fed. R. Crim. P. 41(e),[1] for the return of a car seized by agents of the Drug Enforcement Administration ("DEA") and forfeited under 21 U.S.C. § 881, as property purchased with the proceeds of illegal drug activities. Finding no error, we affirm.

I.

On December 5, 1984, special agents of the DEA and the Internal Revenue Service, as well as members of the Baltimore City Police Department, searched the residence of Melvin Williams in Baltimore, Maryland, and seized, among other things, a 1982 Maserati Quattroporte automobile, titled in the name of Scrapp and parked in front of Williams' home. The search and seizure were the result of a long and intensive investigation by state and federal agents concerning the drug activities of Williams and the organization which he headed in Baltimore. A warrant had been issued on November 29, 1984, by a United States Magistrate, listing specific categories of property to be seized from Williams' home, including documents, books, records, currency, jewelry, and firearms. The agents' affidavit had indicated the lack of other income to be attributed either to Williams or to his wife, Mary. The Maserati, however, was not specifically listed among the items of property to be seized.

The record in the instant case reveals that the Maserati was registered on May 11, 1983, to Scrapp and that another organization, Bel Air Auto Mart, was listed as a lien holder. At the time the vehicle was seized, Williams

[1] Fed. R. Crim. P. 41(e) provides in pertinent part that:
A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property on the ground that he is entitled to lawful possession of the property which was illegally seized. The judge shall receive evidence on any issue of fact necessary to the decision of the motion.

was an employee of Scrapp and his wife, Mary, as well as his father-in-law, were both officers of the corporation. In addition, Williams had formerly been president of Scrapp until sometime in the late 1970's.

Williams, who has a long history of drug convictions, was tried by a jury and on February 5, 1985, was convicted of *inter alia,* attempted possession of cocaine with intent to distribute in the Eastern District of Virginia, in violation of 21 U.S.C. §§ 846, 841(a)(1), and 18 U.S.C. § 2. That conviction was sustained by this Court in *United States v. Hawkins and Williams,* 788 F.2d 200 (4th Cir. 1986).[2]

On April 26, 1985, DEA mailed a notice to Williams, both at his home address and at Scrapp, as well as to Bel Air Auto Mart. The notice stated that the Maserati had been seized and forfeited, pursuant to federal forfeiture statutes and regulations, and provided the opportunity to file within thirty days a petition for the remission or mitigation of the forfeiture. Subsequently, Williams filed such a petition, stating that he had an equitable interest in the car and that Bel Air Auto Mart had legal title. Williams denied any connection between the car and illegal drug activity.

Williams' petition was denied on July 10, 1985, on the ground that there was "probable cause to believe that the vehicle was purchased with the proceeds of the petitioner's drug dealing activities." No other petitions for remission or mitigation were filed by any other party and the car was subsequently given to the City of Baltimore, pursuant to the government's authority to equitably share forfeited property with local and state police officials.

Five months later, on December 13, 1985, Scrapp filed a complaint for the return of the car under Fed. R. Crim. P.

[2] In affirming the conviction, we rejected Williams' contentions regarding the validity of the search warrant issued on November 29, 1984.

41(e), alleging that the Maserati had been illegally seized a year earlier. The district court ordered the government to show cause and to supply evidence of probable cause for the seizure of the Maserati on the ground that it was connected to drug transactions.

On March 24, 1986, the government filed copies of a report dated June 27, 1985, of a DEA investigation which recommended the denial of Williams' petition for remission. According to this report, Williams purchased the Maserati for $52,472 on March 18, 1983, by placing a down payment of $10,000 in cash, consisting of old $10 and $20 bills "wrapped with rubber bands and brought (into the Maserati dealership) by Mr. Williams inside a leather pouch." The balance of $42,472 was later paid with a check from Bel Air Auto Mart.

The report further stated that according to Quincy Edwards, owner of Bel Air Auto Mart, Williams had approached him in May, 1983, seeking to arrange the sale and financing of the vehicle from the dealership to Scrapp. Edwards stated that Williams signed over a check to him for the car, in the amount of $25,469.75, representing insurance proceeds covering the loss of Williams' 1981 BMW automobile. Finally, after detailing Williams' numerous arrests for drug-related offenses dating back to 1963, as well as his previous narcotics convictions, the report concluded by stating as follows:

> In the year 1981, Melvin and Mary WILLIAMS reported approximately $16,000 income. This investigation to date revealed that Melvin WILLIAMS expended a far greater amount than what he reported on tax returns. It was during this time period that Melvin WILLIAMS acquired the 1981 BMW, with no lien recorded.
>
> In the year 1983, Melvin and Mary WILLIAMS reported approximately $66,000 income. During this time period the 1982 Maserati was acquired by

> Melvin WILLIAMS. While the vehicle itself was in the name of "SCRAPP INVESTMENTS" and monthly payments on an alleged lien of $28,000 from Bel Air Auto Mart were being made through the Corporation. [sic] The Corporate books reveal that the vehicle was not an asset; also information received to date through this investigation that John Quincy Edwards trading as Bel Air Auto Mart is a long time personal friend of Melvin WILLIAMS and that Melvin WILLIAMS has stated to others that he did not want expensive vehicles in his own name. In addition information received to date indicates that John Quincy Edwards T/A Bel Air Auto Mart has been known to record false liens on vehicles purchased through him and in the case of Melvin WILLIAMS one false lien has been documented.

Although Scrapp received a copy of this report, it filed no response. The district court concluded that the facts derived from DEA's investigation were sufficient to "clearly establish probable cause to believe that the Maserati was purchased with proceeds from illegal drug transactions." The court also noted the presence of other factors which it found prevented the exercise of its equitable jurisdiction. These included an ongoing grand jury investigation of Williams and the government's need of the car as evidence in that investigation, as well as adequate legal remedies which were available to Scrapp either through an independent action for return of the property, if the grand jury chose not to indict Williams, or through a suppression motion if an indictment were returned. Accordingly, the district court dismissed Scrapp's complaint, concluding that an evidentiary hearing was not necessary.

This appeal followed.

II.

On appeal, Scrapp contends that the district court erred in dismissing its Rule 41(e) complaint without an

evidentiary hearing. Specifically, Scrapp argues that the Maserati was illegally seized without probable cause at the time of the seizure on December 5, 1984, and that appellant never received proper notice of the car's seizure or forfeiture. Under the circumstances present here, we find no merit in appellant's contentions.

The instant case clearly involves a forfeiture of property and is not a search and seizure case. Scrapp's action is nothing more than an attempt to circumvent the finality of a forfeiture decision by belatedly interjecting arguments regarding the illegality of the initial seizure through Rule 41(e). This we cannot sanction.

Based upon DEA's investigate report, the government clearly had probable cause to believe that the car in this case was purchased with drug proceeds and was, therefore, subject to forfeiture under § 881.[3] The mere fact that the report was not prepared until six months after the car was initially seized does not mean that probable cause was lacking on the date of the seizure in December, 1984. Moreover, even an illegal seizure is not necessarily fatal to a forfeiture of the seized property if the basis for forfeiture can be sustained by independent and untainted evidence. *United States v. One 1978 Mercedes Benz, Four-Door Sedan*, 711 F.2d 1297, 1303 (5th Cir. 1983); *United States v. One (1) 1971 Harley-Davidson Motorcycle*, 508 F.2d 351, 351-352 (9th Cir. 1974) (per curiam).

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[3] 21 U.S.C. § 881(b)(4) provides that:

> Any property subject to civil or criminal forfeiture to the United States under this subchapter may be seized by the Attorney General upon process issued pursuant to the Supplemental Rules for Certain Admiralty and Maritime Claims by any district court of the United States having jurisdiction over the property, except that seizure without such process may be made when—
>
> > the Attorney General has probable cause to believe that the property is subject to civil or criminal forfeiture under this subchapter.

Furthermore, we do not believe that the application of Rule 41(e) is required to protect Scrapp's interest. Here, Williams responded to the government's notice of forfeiture, while Scrapp, an organization with which Williams and his family have been directly and intimately connected for many years, chose not to act in any way to assert an ownership interest in the Maserati until more than one year after its seizure and five months following the denial of Williams' petition for remission. Then, even after filing the instant action, appellant failed to respond to the government's submitted evidence of probable cause. Given these facts, appellant's tardy and inappropriate resort to Rule 41(e), as well as its arguments concerning the alleged illegality of the seizure and lack of due process, are singularly unconvincing. Accordingly, we conclude that under the circumstances, the district court did not err in dismissing the instant complaint without a hearing and in holding that Scrapp's remedies, if any, fall outside the scope of a Rule 41(e) proceeding.

III.

For the foregoing reasons, the order of the district court is affirmed.

AFFIRMED

United States Court of Appeals
for the Fourth Circuit
(FILED JUNE 30, 1987)

No. 86-1670

Scrapp Investment Co., Inc., Appellant

v.

United States of America, Appellee.

On Petition for Rehearing with Suggestion
for Rehearing In Banc

ORDER

The appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of the Court requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Judge Hall, with the concurrence of Judge Widener and Judge Spencer, United States District Judges, sitting by designation.

For the Court,

JOHN M. GREACEN,
Clerk.